No. 95-1376

Supreme Court, U.S.
FILED
JUN 21 1996

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

CHARLES T. ROBINSON, SR.,
*Petitioner,*

v.

SHELL OIL COMPANY,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF FOR PETITIONER

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59 pp

## QUESTION PRESENTED

Does the term "employees" in section 704(a) of Title VII of the Civil Rights Act of 1964, making it unlawful for an employer to discriminate against any of his employees or applicants for employment because they have exercised rights accorded them by Title VII, include former employees?

## PARTIES TO THE PROCEEDING

The parties to the proceeding are:

Charles T. Robinson, Sr., Plaintiff below, Petitioner here.

Shell Oil Company, Defendant below, Respondent here.

Shell Oil Company is wholly owned by Shell Petroleum Inc. Shell Petroleum Inc. is directly or indirectly owned 60% by Royal Dutch Petroleum Company and 40% by the "Shell" Transport and Trading Company, p.l.c., which are publicly traded companies. Shell Oil Company has no subsidiaries which are less than wholly owned.



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*Respondent.*

**On Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit**

## BRIEF FOR PETITIONER

## OPINIONS BELOW

The November 29, 1995 in banc opinion of the court of appeals is set forth in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at pp. A-1 to A-29, and is reported at 70 F.3d 325 (1996). The unreported panel opinion of January 18, 1995, is set forth at Pet. App. A-30 to A-61. The district court opinion is set forth at Pet. App. A-62 to A-61.

## JURISDICTION

Jurisdiction is conferred by 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

## STATEMENT OF THE CASE

Petitioner Charles T. Robinson, Sr. was employed by Shell Oil Company as a Territory Sales Representative. He was terminated on October 13, 1991. He immediately filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) charging Shell with racial discrimination, alleging that he had been fired because of his race (Black).

A few months after he filed his EEOC charge, petitioner applied for a job with Metropolitan Life Insurance Company. Metropolitan Life indicated that it would hire petitioner, contingent on the reference Shell gave him. Metropolitan Life requested Shell to complete a questionnaire regarding petitioner's job performance. Shell,



however, gave petitioner the lowest possible ratings in each category and indicated that it would not re-employ him. Metropolitan Life thereupon refused to hire petitioner.

Petitioner subsequently filed a second charge with the EEOC, charging Shell with having given him a poor reference in retaliation for his first charge. On January 4, 1993, petitioner filed a *pro se* complaint in the United States District Court for the District of Maryland, alleging that Shell violated section 704(a) of the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-3(a), by "providing false information and negative job references" to prospective employers.[1] Joint Appendix ("JA") 5a, 6a. Shell promptly moved to dismiss for failure to state a claim upon which relief can be granted, asserting that petitioner's retaliation complaint was not covered by Title VII because his employment with Shell was terminated prior to the alleged negative references and that section 704(a) does not cover former employees. JA 2a. The district court granted Shell's motion on April 8, 1993, relying on the Fourth Circuit's decision in *Polsby v. Chase*, 970 F.2d 1360 (4th Cir. 1992), which it concluded had "expressly held that Title VII does not confer upon an ex-employee a cause of action against a former employer for acts of retaliation allegedly committed after the employment relationship has ended." Pet. App. A-62. The District Court noted that "other Circuits have held to the contrary, [but] this court is, of course, bound by the law of the Fourth Circuit." Pet. App. A-62 to A-63. Petitioner noted a timely appeal. JA 2a.

Eighteen days after the District Court dismissed petitioner's suit, *Polsby* was vacated by this Court. ___ U.S. ___, 113 S.Ct. 1940 (1993).

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[1]Petitioner brought a separate action concerning his termination from Shell Oil. After trial, judgment was entered for Shell Oil.

On petitioner's appeal, a panel of the Fourth Circuit reversed. Pet. App. A-30 to A-61. Shell petitioned for rehearing in banc. JA 3a. On rehearing in banc, the Fourth Circuit affirmed the District Court, with two dissents. Pet. App. A-1 to A-29. A timely petition for certiorari was granted on April 22, 1996.

## SUMMARY OF ARGUMENT

The statutory definition of "employee" in Title VII, "an individual employed by an employer," 42 U.S.C. § 2000e(f), can literally mean "an individual formerly employed," because "employed" is both the past and present tense, passive voice and the past tense, active voice of the verb "employ." In common usage, "employee" often means an individual who is not currently performing work for an employer. This Court has repeatedly used the term to refer to former employees, *e.g.*, pensioners, *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158 (1989), individuals who were unemployed, *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967), retired workers, *Fleming v. Nestor*, 363 U.S. 603 (1960), unemployed disabled workers, *Richardson v. Belcher*, 404 U.S. 78 (1971), and social security beneficiaries, *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41 (1986), as well as applicants for employment. *Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 168 (1971).

The term "employee" is used in nine places in Title VII to refer to former employees. Section 717(c) literally gives only federal "employees" or applicants for employment the right to sue under Title VII. Section 717(b)(3) provides for notification of final agency action on a discrimination complaint to be given only to "employees" or applicants for employment. In each instance, the word "employee" must



mean former as well as current employees or federal employees who have been discharged would not be able to exercise the rights afforded by Title VII. Section 717(a) prohibits discrimination against "employees" and applicants for employment in federal employment. This cannot mean that a federal agency may lawfully discriminate against a retired federal employee. Sections 706(g)(1) and 717(b) provide for the "reinstatement" of "employees." Only former employees can be "reinstated." Section 714 protects EEOC "employees" against violent reprisals for their official actions. Congress surely did not intend to allow such reprisals against former EEOC employees. Sections 706(b) and 709(e) contain confidentiality provisions applicable to EEOC "employees." Surely former EEOC employees are not relieved of such requirements. In each instance, the term "employee" is used when clearly "employee or former employee" is meant. The meaning of "employee" in section 704(a) can only be determined by examination of the text and purpose of the section.

Section 704(a) is intended to promote enforcement of Title VII. Section 704(a) covers the charge filed by petitioner since retaliation against the petitioner on account of that charge would be unlawful under section 704(a) if committed by an employment agency, a joint labor-management committee, or a union of which petitioner was a member. No rational reason appears why Congress would bar all these entities from retaliating against an individual who filed such a charge but would nonetheless allow an employer to so retaliate.

A threat that filing charges or cooperating with the EEOC will lead to retaliation would strongly deter aggrieved individuals from filing charges. If former employees were not protected from retaliation, employers could retaliate against a former employee by terminating his or her severance pay or medical insurance, cutting off retirement

benefits, seeking revocation of a professional license, persuading a subsequent employer to discharge the employee, filing a baseless civil suit, orchestrating the groundless arrest and criminal prosecution of the employee, or even resorting to physical violence, all without violating Title VII. If employers could legally retaliate against former employees for filing EEOC charges, they could promulgate and announce an official written policy of retaliating against any former employee if he or she files a charge, thereby effectively gutting Title VII. The lower court's interpretation of section 704(a) gives employers an incentive to fire any employee who might intend to file an EEOC charge, since dismissed employees could be openly intimidated from filing charges.

The lower court erred in reasoning that section 704(a) does not protect former employees from post-employment retaliation by their former employers because Title VII assertedly does not redress discrimination that takes place after the employment relationship has ended. This Court has squarely ruled to the contrary in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), holding that a benefit of employment that accrues after a person's employment ends can be a term, condition, or privilege of employment, and therefore be protected against discriminatory treatment under Title VII. If an employer chooses to include post-employment references among the privileges of employment, it cannot dole out that benefit in a discriminatory manner. Consequently, since a claim of discrimination in regard to a post-employment job reference would be cognizable under the substantive prohibitions of Title VII, a claim of retaliation for making such a claim must be cognizable under section 704(a).

The anti-retaliation provisions of federal labor law have traditionally been broadly construed. *NLRB v. Scrivener*, 405 U.S. 117 (1972); *Bill Johnson's Restaurants,*



*Inc. v. NLRB*, 461 U.S. 731 (1983); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Public Employees Retirement Sys. v. Betts*. In doing so, this Court has on several occasions construed the term "employee" to include former employees. *E.g., Nash v. Florida Industrial Comm'n*. Such a construction of section 704(a) is necessary to give effect to the purposes of Title VII.

## ARGUMENT

### INTRODUCTION

The anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is contained in section 704(a) of the Act. It provides, in part,

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). In the decision under review, the Fourth Circuit construed this provision as not applying to former employees on the grounds that the definitional section of Title VII defines "employee" as "an individual employed by an employer." 42 U.S.C. § 2000e(f). Therefore, the lower court reasoned, the term "employee" in Title VII cannot include "an individual *no longer employed* by an employer." Pet. App. A-11 (emphasis in the original). The Fourth Circuit based its decision on the premise that the term "employee" in Title VII admits of no more than one meaning — an individual currently employed by an employer, and that this is the meaning of "employee"

*everywhere* that it appears in Title VII. Pet. App. A-11. This assertion is demonstrably wrong. The word "employee" appears in Title VII nine times in circumstances where it clearly cannot be limited to current employees and it is commonplace for courts, including this Court, as well as Congress and others, to use the term "employee" to refer to former employees as well as to current and future employees.

## I. USE OF THE TERM "EMPLOYEE" TO DENOTE THE INDIVIDUALS PROTECTED BY SECTION 704(a) DOES NOT PRECLUDE PROTECTION OF FORMER EMPLOYEES

### A. In Common Usage "Employee" Often Includes Former Employees

This Court has repeatedly observed that the word employee "is not treated by Congress as a word of art having a definite meaning"; rather, "it takes color from its surroundings . . . [in] the statute where it appears." *NLRB v. Hearst Publications*, 322 U.S. 111, 124 (1944)(*quoting United States v. American Trucking Ass'ns*, 310 U.S. 534, 545 n. 29 (1940)).[2] The meaning of "employee" "derives from the context of [the statute in which it is found], which 'must be read in the light of the mischief to be corrected and the end to be attained.'" *NLRB v. Hearst Publications*, 322 U.S. at 124 (*quoting South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940)).

[2] See also *United States v. Silk*, 331 U.S. 704, 714 (1947)("The word 'employee' . . . was not . . . used [in the NLRA] as a word of art, and its content in its context was a federal problem to be construed 'in the light of the mischief to be corrected and the end to be attained.'")



This Court has often used the term "employee" to refer to former employees. In *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967), this Court described as an "employee" an individual who had lost her job and was seeking unemployment compensation:

> Florida has applied its Unemployment Compensation Law so that *an employee* who believes he has wrongly been discharged has two choices: (1) he may keep quiet and receive unemployment compensation until he finds a new job, or (2) he may file [a] . . . charge . . . and risk financial ruin.

389 U.S. at 239 (emphasis added). In *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987), the Court explained the plight of the jobless plaintiff in *Sherbert v. Verner*, 374 U.S. 398 (1963), as being that "the *employee* was deemed completely ineligible for benefits under South Carolina's unemployment insurance scheme." 480 U.S. at 142 (emphasis added). In *California Human Resources Dep't. v. Java*, 402 U.S. 121 (1971), the Court described the state's process for ruling on unemployment compensation claims as follows: "the preliminary interview . . . to examine the claimant's eligibility . . . is an occasion when the claims of both the employer and *the employee* can be heard. . . ." 402 U.S. at 134 (emphasis added).[3]

This Court has in other contexts as well used the term "employee" in this way. *Fleming v. Nestor*, 363 U.S. 603 (1960), considered the constitutional claims of a retired worker who had been stripped of his social security old-age benefits. "The interest of a covered *employee* under the Act

[3] "The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the *employee*." 402 U.S. at 130 (emphasis added).

is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." 363 U.S. at 611 (emphasis added). In *Richardson v. Belcher*, 404 U.S. 78 (1971), the Court explained that the federal program for former workers no longer physically or mentally able to make a living distinguished "between those disabled *employees* who receive workmen's compensation and those who receive compensation from private insurance." 404 U.S. at 81 (emphasis added).[4] In *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court upheld the authority of state programs for disabled workers to fix "the benefit level deemed appropriate to compensate *employee* disability." 417 U.S. at 494 (emphasis added). In *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41 (1986), the Court explained that the social security law had been amended to prohibit states and localities from withdrawing from the system because "Congress believed that sound social policy required protection of *employees* who move from job to job." 477 U.S. at 47 (emphasis added).[5]

This Court has also referred to a number of instances in which the word "employee" was used in legislation to encompass individuals who no longer work for an employer. *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 169 (1971)(*citing Blassie v. Kroger Co.*, 345 F. 2d 58, 70 (8th Cir. 1965)(retired workers are

[4] The Court stated that the statute limits benefits to "80% of the *employee's* average earnings prior to the disability." 404 U.S. at 83 (emphasis added).

[5] The Committee report summarized in this sentence clearly concerned a worker who leaves the employ of state or local government for other work, not one who works for the same government employer in a series of different positions. The passage quoted above would make no sense unless understood in this manner. *See* H.R. REP. NO. 98-25, 98th Cong., 1st Sess., at 19 (1983).



"employees" for the purpose of section 302(c)(5) of the Labor Management Relations Act)); *United States v. American Trucking Ass'ns*, 310 U.S. at 546 n.29 (*citing Nashville, C & St. L. Ry. v. Railway Employees' Dept.*, 93 F. 2d 340 (6th Cir. 1937)(furloughed workers are "employees" within the meaning of the Railway Labor Act)).[6]

This Court has also used the term "employee" to refer to prospective or future, rather than current, employees.

> [A]pplicants for employment and registrants at hiring halls—who have never been fired in the first place—as well as persons who have quit or whose employers have gone out of business are . . . members of the active work force available for hire and at least in that sense could be identified as "employees."

*Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. at 168 (1971). Under the National Labor Relations Act "'employee' includes job applicants." *NLRB v. Town & Country Elec., Inc.*, ___ U.S. ___, 116 S. Ct. 450, 452 (1995)(*citing Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-86 (1941)).

[6] See *United States v. Griffith*, 2 F.2d 925, 927 (Ct. App. D.C. 1924)(former employee receiving disability payments is an "employee" of the District of Columbia for purposes of common law rule prohibiting employees from sitting on criminal juries); *McPherson Hotel Co. v. Smith*, 127 N.J. Eq. 167, 12 A.2d 136 (Ct. Chancery 1940)(dismissed striker is still an "employee" for purposes of state law prohibiting injunction to stop picketing based on a dispute "between employer and employee"); *United Firefighters v. Los Angeles*, 231 Cal. App. 3d 1976, 283 Cal. Rptr. 8, 12 (Ct. App. 1991)(dismissed firefighter is an "employee" under collective bargaining agreement authorizing "employees" to file grievances).

Congress, too, has repeatedly used the term "employee" to mean former employee. The Employee Retirement Income Security Act (ERISA) defines an "employee pension benefit plan" as one that "provides retirement income to employees," 29 U.S.C. § 1002(2)(A), and defines "employee," as does Title VII, as an "individual employed by an employer." 29 U.S.C. § 1002(6). Yet in this context "employee" can only mean a former or retired employee, since virtually no pension plans provide income to individuals who still hold regular positions with the firm.

Similarly, 5 U.S.C. § 7703(a)(1), enacted as part of the Civil Service Reform Act of 1978, provides that "[a]ny employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision." Section 7703(b) provides that such review shall be obtained by filing a petition for review in a court of appeals except for a case of discrimination arising, *inter alia*, under Title VII, which shall be filed in federal district court. Cases arising under this provision are ones involving disciplinary actions against federal employees, including cases in which the employee has been removed and who is, therefore, necessarily a former employee.[7]

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[7] 5 U.S.C. §§ 4303 and 7513 provide that an "employee" who has been removed for unacceptable performance or for cause is "entitled to appeal the action to the Merit Systems Protection Board under section 7701." Section 7701(a) states that "An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board under any law, rule or regulation." Once again, "employee" necessarily includes persons who have been removed from the federal service and who are, therefore, former employees.



Doubtless the use of the term "employee" to refer to a former employee might be characterized as "colloquial,"[8] but four members of the court of appeals below, judges well familiar with common and legal usage, thought former employees to be among the individuals who might in practice be denoted by that word. Pet. App. A-27, A-29. No member of the majority below differed with that characterization of the way in which "employee" is often utilized. If this were not among the accepted meanings of "employee," it would be exceedingly strange for eight Circuits to have applied to former employees the protections established by section 704(a) for "employees" without remarking upon the existence of any such semantic problem.[9]

### B. The Term "Employee" is Repeatedly Used in Title VII to Mean "Current, Future or Former Employee"

The term "employee" appears a total of forty-four times in the body of Title VII. Far from demonstrating that Congress understood or intended the term to have a single uniform meaning, the diverse provisions of Title VII make

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[8] *Pantcheko v. C.B. Dolge Co.*, 581 F.2d 1052, 1055 (2d Cir. 1978).

[9] *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194 (3d Cir. 1994); *EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993); *Christopher v. Stouder Mem. Hosp.*, 936 F.2d 870 (6th Cir. 1991); *Passer v. American Chemical Soc'y*, 935 F.2d 322 (D.C. Cir. 1991); *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322 (5th Cir. 1991); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990); *Bailey v. USX Corp.*, 850 F.2d 1506 (11th Cir 1988 ); *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085 (5th Cir. 1987); *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864 (9th Cir. 1982); *Pantcheko v. C.B. Dolge Co.*, 581 F.2d 1052 (2d Cir. 1978); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977).

clear that the word in fact is utilized in a number of distinct ways throughout the statute.

In nine instances the word "employee" is used in Title VII in circumstances which clearly encompass former employees. Section 717(c), regarding discrimination in federal employment, literally gives only "an employee or applicant for employment" a right to file a civil action if he or she is aggrieved by the final disposition of a complaint. Here the term "employee" must include former employees or the Act would give discharged employees no right of action for discrimination that occurred before being terminated or for a discriminatory discharge.

Section 717(b)(3) provides for notification of federal agency final action on an EEO complaint to be given only to an "employee or applicant for employment." This use of the term "employee" cannot mean that terminated or retired employees are not entitled to such notice.

Section 717(a) forbids employment discrimination against "employees or applicants for employment" by federal agencies. This cannot mean that a federal agency may discriminate against a retired federal worker with regard to, say, pensions or disability benefits.

Sections 706(g)(1) and 717(b) authorize as remedies the "reinstatement . . . of employees." These provisions must mean "reinstatement of former employees." Current employees obviously cannot be "reinstated."

Section 714 provides that "sections 111 and 1114, Title 18, shall apply to officers, agents, and employees of the [EEOC] in the performance of their official duties." The referenced sections of Title 18 protect employees and former employees of identified federal agencies from violence directed against such individuals on account of the performance of their official duties. Since § 111 expressly



protects government workers after they leave office, section 714 is not limited to protecting only current EEOC employees from violent reprisals.

Sections 706(b) and 709(e) similarly contain provisions literally applicable only to "employees" but which clearly mean "employees or former employees." Section 706(b) prohibits "employees" of the EEOC from disclosing things said or done during informal conciliation efforts by the EEOC and section 709(e) contains two separate provisions barring "employees" of the Commission from disclosing information obtained by the Commission during an investigation. Presumably, an employee of the Commission is not relieved of these confidentiality provisions when he or she leaves the employ of the Commission.

In each of these provisions, the term "employee" is used when clearly "employee or former employee" is meant. The framers of Title VII manifestly chose to use a single term in a variety of senses without recourse to modifying adjectives such as "past," "current," "prospective" or "future."

Conversely, there are a number of provisions of Title VII in which the term "employee" necessarily refers to future, rather than current or former employees. Section 701(c) defines an employment agency, *inter alia*, as "any person regularly undertaking . . . to procure employees for an employer or to procure for employees opportunities to work for an employer." Here "employees" refers to individuals who would subsequently become employees if the agency were successful in finding them work. Obviously this provision is not limited to firms that find work for individuals who already have jobs with other employers. Similarly, section 701(e) provides that a labor organization shall be deemed to be engaged in an industry affecting commerce if it "maintains or operates a hiring hall or hiring

office which procures employees for an employer or procures for employees opportunities to work for an employer." 42 U.S.C. § 2000e(e). Here too, "employee" must refer to future employment. As with employment agencies, hiring halls ordinarily operate to provide job placement for individuals who are not current employees at the time the assistance is given.

Section 703(e)(1) specifies that it is not an unlawful employment practice for an employer to "hire . . . employees" on the basis of religion, sex or national origin provided those criteria are bona fide occupational qualifications. The BFOQ clause is not, of course, limited to the hiring of individuals who are already employees of some other employer. Here "employee" refers not to their status prior to being hired (as in "hire a college graduate") but their status subsequent to being hired. The same is true of section 703(e)(2), which permits certain employers to "hire . . . employees of a particular religion." 42 U.S.C. § 2000e-2(e)(1). Sections 706(g)(1) and 717(b) list "hiring of employees" as among the remedies available for employment discrimination. Manifestly this speaks not about hiring existing employees away from other employers; workers who already have jobs are the least likely to seek such a hiring remedy.

On the other hand, there are provisions of Title VII whose very terms make clear that the word employee does there refer only to a current employee. Section 701(b) defines employer as an entity which has "fifteen or more employees *for each working day*" (emphasis added). Section 702(b) refers to "employees *in a workplace*" (emphasis added). Section 703(h) permits the use of different standards of compensation for "employees *who work* at different locations" (emphasis added). Section 709 authorizes the EEOC to provide reimbursement to state "agencies and their employees *for services rendered* to assist



the Commission" (emphasis added). Section 711 requires employers to post certain notices "in conspicuous places upon its premises where notices to employees . . . are customarily posted." Section 717(b) directs federal agencies to establish a plan "to provide a maximum opportunity for employees to advance so as to perform at their highest potential."

Consequently, it cannot be said that the term "employee" means "current employee" *everywhere* in Title VII. The Fourth Circuit was clearly wrong in holding that a definition of "employee" that excludes former employees "controls the meaning of 'employee' whenever it appears throughout the statute." Pet. App. A-11. The meaning of the term must be determined by the statutory context. In sum, although "employee" is at times used in Title VII to refer exclusively to current employees, that is far from the only way in which the term is utilized in the statute. The proper meaning to be attached to the term must be gleaned, not from any inherent clarity in the word, but from the context provided by the specific statutory provision in which the word is used.

### C. The Statutory Definition Contains An Inherent Ambiguity Based On The Multiple Possible Meanings Of The Term "Employed."

The court of appeals based its statutory analysis largely on the provision of Title VII defining an "employee" as "an individual employed by an employer." 42 U.S.C. § 2000e(f). The pivotal word "employed," the court below reasoned, was "plain," "clear," "not ambiguous," and "admits of no more than one meaning"—i.e., "perform*ing* work under an employer-employee relationship." Pet. App. A-7, A-9, A-11, A-12 (emphasis supplied). This assertion misapprehends the tense and voice in which the definitional section uses the past participle of the verb "employ" in the adjectival phrase

modifying the term "individual."

As the Fourth Circuit explicates the pivotal word ("employed") in the statutory definition, it is the present tense and passive voice form of the verb "employ." Thus, the Fourth Circuit chooses the present participle of the verb "perform" to explain that "an individual employed by an employer" is a person presently "performing work under an employer-employee relationship."

This understanding of the statutory definition is certainly a possible one, because the *present tense, passive voice* of the verb "employ" is indeed "employed." Thus a phrase like "organizers employed by the 1996 Republican and Democratic nominees" could refer to political workers engaged at the time the phrase is used in trying to win votes for Senator Dole or President Clinton. But the same phrase is not unambiguously limited to workers presently doing campaign work. Organizers who worked for the same candidates at an earlier point in the 1966 campaign but who quit or were fired before the moment when the phrase is uttered could still be described as "organizers employed by the 1996 Republican and Democratic nominees." That is so because the *past* tense of the verb "employ" — in either the active *or* passive voice — is *also* "employed."[10]

It is precisely for this reason that the term "employed" in the statutory definition is hardly "unambiguous" or "plain." "Employed" may be used in the passive voice to refer to persons presently *or* formerly

[10]Thus, the phrase "organizers employed by the 1996 Republican and Democratic nominees" could also refer to individuals who at some point in the past could correctly have been described as working on behalf of the candidates (past tense, passive voice) *or* to individuals with whom at some point in the past the 1996 nominees had entered into employment relationships (past tense, active voice).



engaged in the employment relationship; or it may be used in the active voice to refer to persons with whom an employment relationship was commenced in the past (whether or not it now continues). If the statutory definition of "employee" contained in 42 U.S.C. § 2000e(f) turns, as the court below correctly held that it does, upon the word "employed," the definitional language is simply inadequate to indicate conclusively the tense or tenses, and voice or voices, in which the word is inflected. But if the term is used in the *past tense, active voice*, and refers to individuals with whom an employment relationship was commenced in the past, it is broad enough to protect petitioner from post-termination retaliation for filing an EEOC charge alleging unlawful termination.

Where two forms of a verb are identical, which meaning is intended may often be clear from the context in which the word appears. Thus, in current usage, "employed by Eastern Airlines" clearly refers to former employees, whereas "employed by the 1996 Olympic Committee" would probably refer to present employees. But section 2000e(f) itself throws no particular light on this issue; the words "by an employer" tell us little, since (more or less by definition) the only entities by whom individuals could be said to be employed (in either voice) are employers.

The opaque language of section 2000e(f) is too slender a reed to support any definitive resolution of the question posed by this case. As this Court observed regarding the similarly phrased definition of "employee" in 29 U.S.C. § 1002(6),[11] "ERISA's nominal definition of 'employee' as 'any individual employed by an employer,'. . . is completely circular and explains nothing." *Nationwide*

[11] "The term 'employee' means any individual employed by an employer."

*Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992).

The language in the Title VII definition on which the court below relied, moreover, is also to be found in the definition of employee in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 630(f), and the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(e)(1). A decision for respondent on this basis would require this Court to repudiate portions of *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158 (1989), and to reject the Secretary of Labor's longstanding interpretation of the FLSA. See part III, *infra*.

## II. THE TEXT AND PURPOSE OF SECTION TITLE VII AND OF 704(a) IN PARTICULAR DEMONSTRATE THAT "EMPLOYEE," AS USED IN THAT SECTION, ENCOMPASSES FORMER EMPLOYEES.

### A. In The Context Of Section 704(a)'s Purpose Of Protecting The Exercise Of Title VII Rights, The Term "Employee" In That Section Must Be Construed To Cover Former Employees Of An Employer In Order To Effectuate Enforcement Of The Statute

The appropriate meaning of the term "employee," or of any statutory language, must be assessed in the context of the provision and statute in which it appears.

> To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute . . .

*United States v. American Trucking Ass'ns*, 310 U.S. at 542. The text of a statute as a whole indicates "the evils the statute was designed to eradicate." *NLRB v. Hearst Publications*, 322 U.S. at 127. "[T]he history which led to [an] Act and the aims which infuse it give direction to our inquiry." *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 182. The language of each section discloses the manner in which that particular provision was intended to advance the overall statutory purpose.



Title VII was enacted to eradicate the historic and pervasive evil of invidious discrimination in employment. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975). The enforcement of Title VII, like the enforcement of most federal labor laws, is largely dependent on the willingness of aggrieved individuals to bring violations of the law to the attention of federal officials. "The charge process is the lifeblood of Title VII, just as it is under the National Labor Relations Act. . . ." *EEOC v. Virginia Carolina Veneer Corp.*, 495 F. Supp. 775, 777 (W.D. Va. 1980). Under Title VII, as under the NLRA,

> [i]mplementation of the Act is dependent upon the initiative of individual persons who must, as petitioner has done here, invoke its sanctions through filing [a] . . . charge. Congress has made it clear that it wishes *all persons* with information about such practices to be *completely free* from coercion against reporting them. . . .

*Nash v. Florida Industrial Comm'n*, 389 U.S. at 238 (emphasis added). As is true of the Fair Labor Standards Act,

> [t]he provisions of the statute affect . . . vast numbers of business establishments . . . . For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing

detailed federal supervision . . . .

*Mitchell v. DeMario Jewelry*, 361 U.S. 288, 292 (1960). Congress understood full well "that fear of economic retaliation might often operate to induce" victims of discrimination to withhold from the EEOC charges of or information about violations of federal law. *Mitchell v. DeMario Jewelry*, 361 U.S. at 292. "[C]omplete freedom is necessary . . . 'to prevent . . . channels of information from being dried up by employer intimidation of prospective claimants and witnesses.'" *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972).

Section 704(a) safeguards the Title VII enforcement mechanisms, as well as less formal efforts to correct violations of the law, by forbidding retaliation against those who have "made a charge, testified, or participated in any manner in an investigation, proceeding or hearing under [Title VII]" or otherwise "opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a). Section 704(a) unquestionably covers the *charge* in this case. Regardless of the meaning of "employee," retaliation against petitioner, on account of that charge, by an employment agency, a joint labor-management committee, or a union of which he was a member, would clearly be illegal, since as to those entities the proscribed retaliation is not limited to employees. In addition, section 704(a) undeniably protects petitioner from certain forms of retaliation, on account of that charge, by respondent. If petitioner were to today apply for any job at Shell, and be rejected because he had earlier filed an EEOC charge, petitioner would be an "applicant" within the protection of the law.[12] The question presented here, then, is whether section 704(a), which forbids respondent from retaliating

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[12]*See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).



against petitioner by refusing to ever hire him again, permits respondent to retaliate against petitioner in other ways. That issue is of pivotal practical importance because in virtually every reported case involving retaliation against a former employee the retaliation was by an employer and took a form other than a refusal to rehire. See pp. 26-27, nn. 16-24, *infra*.

Employer retaliation against former employees, as much as retaliation against current employees, can deter EEOC charges and other protected activities, and thus frustrate enforcement and implementation of Title VII. A charge filed by a former employee with the EEOC plays precisely the same role in that enforcement scheme as a charge filed by a current employee. A charge filed by a then-current employee does not lose its importance under the Act merely because the charging party subsequently ceases to work for the employer in question. An individual with knowledge of an unlawful practice is of the same value to Commission investigators, and his or her testimony is of the same significance at a trial or administrative hearing, without regard to whether he or she still works for the employer at issue. The information which the EEOC and the courts need from current employees is indistinguishable from the information needed from former employees; indeed, it would at times be the identical information needed from the very same (though now no longer employed) persons.

That reprisals by a former employer could deter such individuals from filing charges or providing information or testimony can hardly be disputed. The form of reprisal alleged in this case is providing to a prospective employer false and derogatory references regarding a charging party. Such a reprisal directed at even a current employee—such as a worker seeking a new position because his or her job will soon be eliminated—would of course violate section 704(a). A threat that filing charges or cooperating with the

EEOC will lead to unfavorable references would likely deter from such actions even a current employee with no immediate plans to seek other employment. But the chilling effect on a former employee would obviously be far greater.

> [P]ost-employment blacklisting is sometimes *more* damaging than on-the-job discrimination because an employee subject to discrimination on the job will often continue to receive a paycheck while a former employee subject to retaliation may be prevented from any work in the trade or occupation previously pursued.

*Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 200 (3d Cir. 1994)(emphasis added). "[A]n employee who believes he has been wrongly discharged has two choices: (1) he may keep quiet . . . until he finds a new job, or (2) he may file [a] . . . charge . . . and risk financial ruin." *Nash v. Florida Industrial Comm'n*, 389 U.S. at 239. A terminated employee who wishes to file a charge of discrimination should not have to sacrifice his chances of finding new employment in order to pursue his rights under Title VII. "[A] claimant needs work that will feed a family. . . . A job is needed now." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 221 (1982). Yet, under the Fourth Circuit's interpretation, an employer that has fired a worker on the basis of race, national origin or gender could, if section 704(a) does not apply, lawfully "use the fear of restricted job market access to win concessions from [the] former employee." *Atkinson v. Oliver T. Carr Co.*, 40 Fair Empl. Prac. Cas. 1041, 1044 (D.D.C. 1986).

Federal courts have long recognized what every worker knows, that unfavorable job references by a former employer are likely to be fatal to the prospects of a job seeker.

> [I]t is a fact of business life that employers almost invariably require prospective employees to provide the names of their previous employers as references when applying for a job. . . . [Job applicants] could be severely handicapped in their efforts to obtain new jobs if [a prior employer] should brand them as "informers" when references are sought.



*Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 306 (5th Cir. 1972).[13] "A hindrance no less severe and no less offensive ensues from discriminatorily contrived accounts of an applicant's unsuitability for employment." *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 723 (D.C. Cir. 1978). With lifetime employment with a single company far less common today than a generation ago, favorable job references have assumed for many workers a significance as great as the seniority rights of the past. *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1986).

The literature of personnel management is replete with statements pointing out the importance to employers of obtaining job references concerning applicants for employment, such as: "References are a very common way of gathering information about a person's experience and performance on previous jobs."[14] or "It's foolhardy to hire

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[13] *Accord, Rutherford v. American Bank of Commerce*, 565 F.2d at 1166; *Sparrow v. Piedmont Health Systems*, 593 F. Supp. 1107, 118 (W.D. N.C. 1984)("there can be little doubt that the lack of a customary recommendation from a former employer severely disadvantages a person seeking employment"); *Atkinson v. Oliver T. Carr Co.*, 40 Fair Emp. Prac. Cas. at 1043 ("a poor recommendation — or no recommendation at all — could effectively destroy a former employee's chances of future employment.")

[14] LLOYD BAIRD, MANAGING HUMAN RESOURCES 136 (1992).

anyone without checking with the last employer to find out the actual job the applicant held and to verify the dates of employment."[15]

Blacklisting is not the only or necessarily the worst form of reprisal that an employer could inflict on a former employee. Employers might cut off a former employee's severance payments or medical insurance,[16] block disbursement of funds owed to the former employee in an employee benefit plan,[17] seek the revocation of the individual's teaching certificate or other professional license,[18] forbid a nurse to work for any doctor practicing in a hospital,[19] arrange to have the charging party removed from civil service eligibility lists,[20] persuade a subsequent

[15]LESTER R. BITTEL AND JOHN W. NEWSTROM, WHAT EVERY SUPERVISOR SHOULD KNOW 179 (6th ed. 1990). See also CHARLES GARFIELD, SECOND TO NONE, HOW OUR SMARTEST COMPANIES PUT PEOPLE FIRST 244 (1992)("Hiring is a complex process, of which interviewing candidates is only one aspect. . . . Being diligent in your reference checking — these are considerations too . . . ."); LIN GRENSING, A SMALL BUSINESS GUIDE TO EMPLOYEE SELECTION 89 (2d ed. 1991)("Checking the references of the applicants applying for a position is absolutely essential . . . . ")

[16] *EEOC v. Cosmair, Inc. L'Oreal Hair Care Div.*, 821 F.2d 1085, 1087 (5th Cir. 1987).

[17] *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322, 1324 (5th Cir. 1991).

[18] *Charlton v. Paramus Bd. of Educ.*, 25 F.3d at 196.

[19] *Christopher v. Stouder Memorial Hosp.*, 936 F.2d 870, 872-74 (6th Cir. 1991).

[20] *Bailey v. USX Corp.*, 850 F.2d 1506, 1507-08 (11th Cir. 1988).



employer to dismiss the charging party,[21] file a baseless civil suit,[22] orchestrate a groundless arrest and criminal prosecution of a charging party,[23] or even resort to physical violence.[24] An employer free to wield all of these weapons could surely suppress virtually all charges and cut off most potential witnesses from the EEOC.

The viability of the Title VII enforcement mechanisms requires that the anti-retaliation protections of section 704(a) be as broad as the substantive anti-discrimination prohibitions of section 703. But exclusion of former employees from section 704(a) would place largely outside the protections of that provision testimony and other actions opposing major categories of discrimination forbidden by section 703. Victims of unlawful discriminatory dismissal will by definition be former employees immediately after that type of violation occurs. If section 704(a) is to

[21] *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1529 (11th Cir. 1990); *Caudill v. Farmland Indus., Inc.*, 919 F.2d 83, 86 (8th Cir. 1990).

[22] *EEOC v. Levi Strauss & Co.*, 515 F. Supp. 640 (N.D. Ill. 1981); *EEOC v. Virginia Carolina Veneer Corp.*, 495 F. Supp. 775, 777 (W.D. Va. 1980); *Buzogany v. Roller Bearing Co.*, 47 Fair Emp. Prac. Cas. 1485, 1486 (D.N.J. 1988).

[23] *Berry v. Stevinson Chevrolet*, 804 F. Supp. 121, 128-31 (D. Colo. 1992); *Beckham v. Grand Affair of N.C.*, 671 F. Supp. 415, 419-20 (W.D. N.C. 1987); *Atkinson v. Oliver T. Carr Co.*, 40 Fair Emp. Prac. Cas. at 1043.

[24] *Reed v. Shepard*, 939 F.2d 484, 492 (7th Cir. 1991)(allegations that retaliation included late-night threatening phone calls, physical attack by a disguised assailant, and shooting at charging party's car); *Commonwealth of Pa. v. Local 542, International Union of Operating Engineers*, 347 F. Supp. 268, 274-75 (E.D. Pa. 1972)(charging parties attacked with razor and chair).

protect at all victims of such discharges, it ordinarily can do so *only* by applying to former employees.[25] The same, of course, is true of victims of discrimination in the payment of retirement benefits. *See Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978). Although section 703 of Title VII undeniably forbids discrimination in discharges and pension benefits, if employers could legally and openly retaliate against anyone who filed a charge asserting such discrimination, those prohibitions in section 703 could well be rendered unenforceable. Section 704(a) should not be construed in a manner likely to effectively nullify specific substantive prohibitions of section 703. *See NLRB v. Town & Country Elec., Inc.*, ___ U.S. ___, 116 S. Ct. 450 (1995).

If former employees were outside the scope of section 704(a), an employer could openly announce to current employees, for example, that it had a policy of giving unflattering recommendations to any former worker who had ever filed a Title VII charge. Such a practice, although inflicted only on former employees, would operate to deter

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[25] Victims of discriminatory discharge almost invariably only file with the EEOC after they have left work. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107 (1988); *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980); *Great Am. Fed. Savs. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979); *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977); *International Union of Elec., Radio & Mach. Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).



current employees from filing charges or cooperating with the EEOC. Indeed, coercing current employees would often be one of the central purposes of such mistreatment of former employees. A state could refuse to provide unemployment compensation to dismissed employees whose discharge was the subject of an EEOC charge. *Cf. Nash v. Florida Industrial Comm'n*. An employer could arbitrarily slash pensions for all female retirees by 50%, and then send to each a notice that it would permanently and completely end the pension of any woman who complained or talked to the EEOC. *Cf. Arizona Governing Committee v. Norris*. An employer could put all former employees "on notice" that it would cut their pensions and file libel actions against any of them who testified in support of any discrimination claim. *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983). "Congress surely did not intend . . . to insulate such blatantly discriminatory practices from judicial redress under Title VII." *County of Washington v. Gunther*, 452 U.S. 161, 179 (1981). Such a construction of section 704(a) "would sanction a most effective way of defeating" enforcement of section 703. *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193.

The Fourth Circuit's interpretation of section 704(a) creates a number of perverse incentives. As Judge Hall correctly observed in his dissenting opinion, an employer that intends to discriminate against an employee would be well advised to fire the employee, since a dismissed employee—unlike a demoted, transferred, or underpaid employee—could be openly intimidated from filing charges through threats of retaliatory action. Pet. App. A-23, n. 4. An employer that had reason to think it might be charged with retaliation against a former employee would be strongly discouraged from rehiring the dismissed worker, even in a lower position, because doing so would render unlawful any ongoing retaliatory actions. *Cf. Ford Motor Co. v. EEOC*, 458

U.S. at 229. Thus, in the instant case, on the Fourth Circuit's view, respondent's allegedly retaliatory denial of a reference would become actionable if respondent permitted petitioner, while seeking other employment, to obtain a temporary job pumping gas at any of the 4000 service stations operated by Shell in the United States.

Retaliation would in some instances become an affirmative defense. An employer charged with having discriminated against a former employee on the basis of race—such as by denying retirement or severance benefits—could win exoneration by proving that it did so, not because the former employee was black, but in order to punish the former employee for having once provided information to the EEOC. And an employer which wished to retaliate against a current employee for filing a charge or testifying could do so legally by waiting until the individual retired or went to work for another employer, and would be at liberty to announce its intentions in advance to that employee. Congress surely did not intend to thus "invite adroit schemes" to undermine enforcement of Title VII. *United States v. Silk*, 331 U.S. 704, 712 (1947). Not even unambiguous statutory language—which is surely lacking here—would lead this Court to such "absurd or futile results." *United States v. American Trucking Ass'ns*, 310 U.S. at 543.

### B. Interpreting § 704(a) To Deny Former Employees Protection From Retaliation By Their Former Employers Would Eviscerate Other Statutory Protections Affecting Post-Termination Aspects of the Employment Relationship.

The Fourth Circuit grounded its decision in part on the assertion that section 703 forbids only "discrimination with respect to certain aspects of employment, and does not



redress discriminatory practices *after* the employment relationship has terminated." Pet. App. A-14 to A-15(emphasis added). However, in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), this Court expressly held that section 703 forbids discrimination in the dispensing of any benefits of employment *after* as well as during the employment relationship:

> The benefit a plaintiff is denied need not *be* employment to fall within Title VII's protection; it need only be a term, condition, or privilege *of* employment. . . . A benefit need not accrue before a person's employment is completed to be a term, condition, or privilege of that employment relationship.

467 U.S. at 77 (emphasis in the original). In the instant case, the petitioner was discriminated against in the provision of a job reference. Although Title VII does not require former employers to provide reference letters, many employers do so, treating favorable recommendations as one of the benefits provided to workers in return for competent and loyal service. In such a situation section 703 forbids an employer to refuse to provide such letters to former employees because of their race, national origin, religion or gender. It would be bizarre if section 704(a) permitted an employer to refuse to provide such letters to a former employee in retaliation for filing a discrimination charge, *e.g.*, a charge that the employer only provided recommendations for white former employees.

The Fourth Circuit's assertion that "Title VII's anti-retaliation provision does not redress post-employment retaliation," (Pet. App. A-14) is flatly inconsistent with the language of section 704(a). As we noted *supra*, section 704(a) unequivocally *does* protect former employees after the end of the employment relationship from retaliation by an

employment agency, a joint labor-management committee, or a union, and from a retaliatory refusal of his or her former employer to rehire the former employee. In practice, however, these protections are of little significance, because virtually every reported case of retaliation against a former employee involves actions taken by a former employer against a worker seeking a job at some other firm.

In some cases if a plaintiff could prove that the dismissal which triggered his charge, and which led in turn to the retaliation which followed, was in fact racially motivated, an equitable remedy for the unlawful discharge might well eliminate the effects of that retaliation in order to put the plaintiff in the "position where [he] would have been in were it not for the unlawful discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. at 421. But Congress cannot have intended such an erratic and unpredictable degree of protection for former employees. "[S]tatutory protection should not turn on . . . events that have no relation to the need for protection. . . . This would be unequal and inconsistent protection and is not the protection needed to preserve the integrity of the . . . process in its entirety." *NLRB v. Scrivener*, 405 U.S. at 124.

An employer may provide individuals with benefits that are part and parcel of the employment relationship even in the absence of an employment relationship. *Hishon v. King & Spalding*, 467 U.S. at 75. "Such a benefit, though not a contractual right of employment, may qualify as a 'privilege' of employment under Title VII." *Id.* As such it "may not be doled out in a discriminatory fashion." *Id.* Title VII protects any individual from discrimination that adversely affects a term, condition or privilege of employment or "incident of employment," even after the employment relationship has ended. *Id.* at 75.



A reference from a former employer to a prospective employer is a common "term, condition or privilege of employment." Just as an employer contemplating hiring an applicant generally checks the applicant's references, employers expect to be asked for references by prospective employers of their former employees. Requests for references on one's former employees is a routine part of business. From the employee's perspective, it is a natural expectation that after the employment ends and he or she seeks new employment, that person's former employer will give the prospective employer a report on the person's qualifications. A reference from one's former employer is one of the "incidents" or "benefits" of employment that form "an aspect of the relationship between the employer and employees," making it a "term, condition, or privilege of employment." It is, of course, clear that "those benefits that comprise the incidents of employment . . . or that form an aspect of the relationship between the employer and employees may not be afforded in a manner contrary to Title VII." *Hishon*, 467 U.S. at 75. Consequently, since a claim of discrimination in regard to a post-employment job reference would be cognizable under the substantive prohibitions of Title VII, a claim of retaliation for making such a claim must be cognizable under section 704(a).

Application of section 704(a) to any retaliation by an employer against a former employee is consistent with the EEOC's longstanding interpretation of that provision. The Commission's regulation regarding employment discrimination claims against the federal government is phrased in broad language that recognizes no exception for former employees:

> No *person* shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act . . . or for participating in any stage of administrative or

judicial proceedings under those statutes.

29 C.F.R. § 1614.101(b)(1992)(emphasis added). The EEOC Compliance Manual interprets section 704(a) to apply to post-employment retaliation. "A respondent employer's obligation to refrain from retaliation against a former employee who has opposed discrimination does not end once that employee leaves its employ." *EEOC Compliance Manual*, § 614.7(f).

Such a broad interpretation of section 704(a) is supported as well by the legislative history of Title VII. The House Labor Committee report on what later became section 704(a) explained that the anti-retaliation provision

> makes it an unlawful employment practice for an employer, employment agency, or labor organization to discriminate in any manner against *another person* because he has opposed any practice made an unlawful employment practice by other sections of the act or because he has made a charge, testified, assisted, or participated in any manner in the enforcement of the act.

H.R. REP. NO. 1370, 87th Cong. 2d Sess., at 11 (1962)(emphasis added). The Interpretive Memorandum of Senators Clark and Case summarizing the final compromise bill explained the meaning of the anti-retaliation section, then numbered section 705(a), as follows:

> . . . Section 705(a) prohibits discrimination by an employer or labor organization against *persons* for opposing discriminatory practices, and for bringing charges before the commission or otherwise participating in proceedings under the title.

110 Cong. Rec. 7213 (emphasis added).



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In sum, retaliation by an employer against a former employee interferes with enforcement of section 704(a) in precisely the same way as the instances of retaliation that are undeniably covered by that section. In many instances retaliation against former employees will have the effect, and indeed the very purpose, of deterring current employees from filing charges or testifying in order to effectuate other substantive rights protected by Title VII. It is quite implausible that Congress, by using the word "employee"—a term utilized elsewhere in Title VII to include former employees—meant to create a gaping hole in the protections of section 704(a) and in the overall statutory enforcement scheme. When Congress created exemptions from the general scheme in Title VII, it did so expressly and with specificity. *Hishon v. King & Spalding*, 467 U.S. at 78 n.11. The exemptions accorded by Title VII to certain practices or situations are either set out in the explicit section 702 exemptions, or are expressly signaled by prefatory language such as "notwithstanding any other provision of this subchapter,"[26] "notwithstanding any other provision of this subchapter"[27] "nothing contained in this subchapter,"[28] or "except."[29] In the absence of any such express indication of any intent to create an exemption, the use of the word "employee" should not be read to create the loophole proposed by the court below.

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[26] 42 U.S.C. §§ 2000e-2(e), 2000e-2(g), 2000e-2(h).

[27] 42 U.S.C. § 2000e-2(k)(3).

[28] 42 U.S.C. §§ 2000e-2(i), 2000e-2(j).

[29] 42 U.S.C. § 2000e-3(b).

## III. THE ANTI-RETALIATION PROVISIONS OF FEDERAL LABOR LAW HAVE TRADITIONALLY BEEN LIBERALLY CONSTRUED

For as long as federal law has regulated relations between labor and management, specific provision has been made to protect workers who seek to enforce federal rights, or who provide information or testimony to federal enforcement agencies. To ensure the vindication of worker rights established by the National Industrial Recovery Act, President Roosevelt issued Executive Order 6711, which prohibited certain forms of retaliation against workers "for making a complaint or giving evidence with respect to an alleged violation."[30] Today anti-retaliation provisions protecting "employees" are contained in nine major federal labor laws: the National Labor Relations Act,[31] Fair Labor Standards Act,[32] Occupational Safety and Health Act,[33] Federal Labor-Management and Employee Relations Act,[34] Migrant and Seasonal Agricultural Worker Protection Act,[35] Longshore and Harbor Workers' Compensation Act,[36] Employee Polygraph Protection Act,[37] Age

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[30]Quoted in *NLRB v. Scrivener*, 405 U.S. at 123.

[31] 29 U.S.C. § 158(a)(4).

[32] 29 U.S.C. § 215(a)(3).

[33] 29 U.S.C. § 660(c)(1).

[34] 5 U.S.C. § 7116(a)(4).

[35] 29 U.S.C. § 1855(a).

[36] 33 U.S.C. § 948a.

[37] 29 U.S.C. § 2002(4).



Discrimination in Employment Act,[38] and Title VII of the 1964 Civil Rights Act.[39]

The 1934 Executive Order was framed in a way that could only have applied to an individual who was actually working for the employer in question at the time of the retaliatory action; the sole retaliatory acts forbidden were to "dismiss or demote" the victim.[40] But all the legislation which followed has utilized the far more general term "discriminate" to denote the forbidden conduct. This Court noted in *NLRB v. Scrivener*, 405 U.S. at 122, that this language reflected "an intent on the part of Congress to afford broad rather than narrow protection," because "complete freedom is necessary . . . 'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'" *Id.* (*quoting John Hancock Mut. Life Ins. Co. v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951)).[41] Unlike the original executive order, the touchstone of these statutory prohibitions is not whether certain specified methods were used by the employer, but whether the employer acted with the forbidden retaliatory motive.

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[38] 29 U.S.C. § 623(d).

[39] 42 U.S.C. § 2000e-3(a).

[40]*NLRB v. Scrivener*, 405 U.S. at 123.

[41] Significantly, *John Hancock* was a case in which the NLRA's anti-retaliation provision was applied to an individual who was *not* working for the employer in question at the time of the retaliatory incident. The court of appeals in that case concluded that section 8(a)(4) of the NLRA nonetheless applied because the term "employee" under the NLRA denoted "in a generic sense, members of the working class." 191 F.2d at 485.

This Court has "liberally construed" such anti-retaliation provisions to assure that victims of discrimination or witnesses to such violations may file charges, testify, assist in investigations, or otherwise oppose violations of federal labor law, "without fear of restraint, coercion, discrimination or interference." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. at 740. Although this Court has not heretofore had occasion to consider the scope of Title VII's anti-retaliation provision, the Court has in a number of instances been called upon to apply the similar provisions of other federal laws. The Court has twice applied the anti-retaliation section of the NLRA to acts of alleged retaliation which were inflicted on individuals only after they had ceased working for the employers in question. *Nash v. Florida Industrial Commission*; *Bill Johnson's Restaurants, Inc. v. NLRB*. The Court has also held that the ADEA prohibits the framing of pension schemes for the purpose of retaliating against individuals who had engaged in protected conduct. *Public Employees Retirement System v. Betts*. These decisions, although not necessarily conclusive of the instant litigation, are persuasive precedent for applying Title VII as well to former employees.[42]

In *Nash v. Florida Industrial Commission*, the petitioner, having been laid off on May 16, 1965, subsequently filed on June 17, 1965, a charge with the

[42]This Court has recognized on a number of occasions that Congress used the National Labor Relations Act as a model for portions of Title VII. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. at 419; *Franks v. Bowman Trnsp. Co.*, 424 U.S. 747, 768-70 (1976); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 366 (1977); *Ford Motor Co. v. Equal Employment Opportunity Comm'n*, 458 U.S. 219, 232 (1982)(citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-98 (1941)); *Zipes v. Trans World Airlines*, 455 U.S. 385, 395, n.11 (1982); *Hishon v. King & Spalding*, 467 U.S. at 76, n.8; *Lorance v. AT&T Technologies*, 490 U.S. 900, 909 (1989).



NLRB that her layoff was the result of union activities.[43] When petitioner sought unemployment compensation from the state, her claim was denied for the period following June 17, pursuant to a state law which barred such compensation if the unemployment resulted from a dismissal that was the subject of an unfair labor practice charge. This Court held that the legality of such a state rule was to be measured against the standard of the anti-retaliation provision contained in section 8(a)(4) of the NLRA. 389 U.S. at 239. Although section 8(a)(4), like section 704(a) of Title VII, applies only to "employees," the Court had no doubt that Mrs. Nash, even after she had lost her job, was still protected by section 8(a)(4)'s prohibition against discrimination "against an *employee* because he has filed charges." 389 U.S. at 238 (emphasis added). The Court reasoned that coercive measures would be particularly harmful to a petitioner such as Nash precisely *because* she was no longer working for her former employer and was therefore "faced with the immediate severance of sustaining funds." 389 U.S. at 239.

A related situation was presented in *Bill Johnson's Restaurants, Inc. v. NLRB*. Following the dismissal of one Myrland Helton, Helton filed an unfair labor charge with the NLRA, and subsequently she, several former restaurant employees and certain striking employees commenced picketing the restaurant. The employer then sued Helton, the other former employees and the striking employees in state court, alleging, *inter alia*, that they had harassed

[43] That charge remained unresolved when the case was before this Court. Brief for Respondents, No. 48, Oct. Term 1967, p. 2.

customers and libeled the employer.[44] In response the General Counsel of the NLRB issued a new complaint under section 8(a)(4), asserting that Bill Johnson's had commenced that suit to retaliate against Helton and the others because they had filed charges under the NLRA and had engaged in protected concerted activities. 461 U.S. at 735. This Court held that such a suit, if commenced with a retaliatory motive, could well violate section 8(a)(4):

> [B]y suing an employee who files charges with the Board . . . , an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit. Regardless of how unmeritorious the employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it. . . . [T]he chilling effect of a state lawsuit . . . is multiplied where the complaint seeks damages in addition to injunctive relief.

461 U.S. at 740-41. This Court remanded the case to the NLRB to consider whether the lawsuit in that case lacked a reasonable basis in fact. 461 U.S. at 749. That remand would have made little sense if section 8(a)(4) were limited to current employees. Were that the case, the charges on behalf of the former employees should have been dismissed.[45] Although *Nash* and *Bill Johnson's* were

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[44] *Bill Johnson's Restaurants, Inc. v. NLRB*, 249 NLRB 155, 157, 162 n.20 (1980), *enforced*, 660 F2d. 1335 (9th Cir. 1981), *vacated and remanded*, 461 U.S. 731 (1983).

[45] The NLRB had also forbidden the employer from retaliating against former employees by means of abusive depositions. 249 NLRB at 165-68, 170.



decided after the adoption of Title VII, even before the enactment of the 1964 Civil Rights Act it was well established that the protections accorded to "employees" by section 8(a)(4) of the NLRA extended to individuals who had been dismissed by an employer.[46]

In *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158 (1989), the Court considered the application to retired workers of the anti-retaliation provisions of the Age Discrimination in Employment Act.[47] Although noting that pension plans are to some degree accorded special treatment under section 4(a) of the ADEA, the Court admonished:

> Under § 4(d) of the ADEA . . . it is unlawful for an employer to discriminate against an employee who has "opposed any action made unlawful by" the Act or has participated in the filing of any age-discrimination complaints or litigation. Nothing in § 4(f)(2) would insulate from liability an employer who adopted a plan provision formulated to retaliate against such an employee. See 29 CFR § 1625.10(d)(5) (1988).

492 U.S. at 180. Section 4(d), like section 704(a) of Title VII, forbids retaliation against an "employee." As a practical matter, of course, most if not all applications of a retaliatory *pension* plan would be to retirees; *Betts'* assertion that

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[46] *E.g., John Hancock Mut. Life Ins. Co. v. NLRB*, 191 F.2d at 485 ("employees" protected by section 8(a)(4) include "not only the existing employees of an employer but also, in a generic sense, members of the working class.").

[47] The plaintiff in that case had retired in 1985, and subsequently brought suit alleging that the state method of calculating her retirement benefits violated the ADEA.

section 4(d) of the ADEA applies to retaliatory pension schemes would be meaningless unless, as the Court clearly assumed, that anti-retaliation provision applies to and protects retirees. In the regulation cited by the Court in *Betts*, the EEOC has authoritatively construed section 4(d) of the ADEA in a manner which clearly rejects any distinctions between current and former workers.[48] Consistent with this language in *Betts* and that regulation, the EEOC has maintained in litigation and the lower courts have consistently held that section 4(d) applies to former employees.[49]

In litigation under the Fair Labor Standards Act, the Secretary of Labor has repeatedly maintained that former employees should be accorded the same protections as current employees, not only with regard to that statute's anti-retaliation provision but also as to the judicially fashioned "informer's privilege," which permits the Secretary, in order to avoid possible retaliation, to refuse to disclose to an employer the names of individuals who have made statements to government investigators.[50] Although section

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[48] The regulation interprets the anti-retaliation provisions of the ADEA to provide "that it is unlawful for an employer, employment agency, or labor organization to discriminate against *any individual* because such individual 'has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act" (emphasis added).

[49] *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d at 1088-89; *Passer v. American Chem. Soc'y*, 935 F.2d at 331; *Cohen v. S.U.P.A., Inc.*, 814 F. Supp. 251, 259-60 (N.D.N.Y. 1993); *Buzogany v. Roller Bearing Co.*, 47 Fair Emp. Prac. Cas. at 1486.

[50] *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977); *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d at 305-06.



15(a)(3) of the FLSA literally protects only an "employee" from retaliation, the lower courts have applied it to former employees, relying on the same NLRA cases cited by this Court in *Nash*.[51] A contrary construction of § 704(a) would be inconsistent with this settled precedent in other statutory contexts and would produce a body of law that is incoherent and ineffective, contrary to the intentions of Congress.

## CONCLUSION

The lower court erred in holding that section 704(a) of Title VII is not applicable to the petitioner's claim. The text and purpose of section 704(a) show that the term "employee" therein encompasses former employees. The Court should reverse the Fourth Circuit's judgment and remand this case for further proceedings.

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[51] *Dunlop v. Carriage Carpet Co.*, 548 F.2d at 146 (*citing John Hancock Mut. Life Ins. Co. v. NLRB,, NLRB v. Syracuse Stamping Co.*, 208 F.2d 77 (2nd Cir. 1953) and *NLRB v. Lamar Creamery Co.*, 246 F.2d 8 (5th Cir. 1957).

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